

**Updated Informative Digest for the State Board of Equalization's  
Adoption of Proposed Amendments to California Code of Regulations,  
Title 18, Section 1588, *Seeds, Plants and Fertilizer***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1588, *Seeds, Plants and Fertilizer*, on December 18, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1588 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action. Mr. John Gamper, from the California Farm Bureau Federation, appeared at the public hearing and expressed support for the proposed amendments. There have not been any changes to the applicable laws or the effect of, the objectives of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1588 described in the informative digest included in the notice of proposed regulatory action. The informative digest included in the notice of proposed regulatory action provides:

Current Law

RTC section 6358, subdivision (d) provides an exemption from sales and use tax for the gross receipts from the sale and the storage, use, or other consumption of fertilizer applied to land, the products of which are to be used as food for human consumption or are to be sold in the regular course of business. For purposes of this exemption, Regulation 1588 defines the term "fertilizer."

The current provisions of Regulation 1588, subdivision (b)(1) define the term "fertilizer" to include manure, commercial fertilizers, as defined in Food & Ag. Code section 14522, and agricultural minerals, as defined in Food & Ag. Code section 14512. Specifically excluded from the definition of fertilizer in Regulation 1588 are soil amendments, as defined in Food & Ag. Code section 14552, and auxiliary soil and plant substances, as defined in Food & Ag. Code section 14513.

In addition, the current provisions of Regulation 1588, subdivision (b)(2) specifically provide that, as a result of the exemption provided by RTC section 6358, subdivision (d), "[t]ax does not apply to sales of fertilizer to be applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business." Also, the last sentence in Regulation 1588, subdivision (b) provides that, "[w]hen insecticides are mixed with fertilizer and the mixture sold, that portion of the total price allocable to the

fertilizer may be excluded from the measure of the tax if the mixed product is applied to land (including foliar application) the products of which are to be: (a) used as food for human consumption, (b) used as feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption, or (c) sold in the regular course of the purchaser's business."

Leaves are able to absorb fertilizer through the pores on their surface. Fertilizer is applied in a foliar application when it is applied directly to leaves (or foliage). Regulation 1588, subdivision (b) has provided that the exemption provided by RTC section 6358, subdivision (d) applies to fertilizer applied in "foliar application" since 1970.

#### Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1588

##### *Need for Clarification*

The Board's Legal Department has previously determined, as early as 1960, that carbon dioxide is a fertilizer when applied to land in farming. This determination is found in Sales and Use Tax Annotation 510.0580:

**Carbon Dioxide.** Carbon dioxide sold at retail to farmers for application to their land to assist in the neutralization of alkaline soils, qualifies as a "fertilizer." 5/6/60.

The May 6, 1960, legal ruling, which is summarized in the annotation, explains that in the examined situation, carbon dioxide was sold to farmers for application to land through their irrigation systems, and used to assist in the neutralization of alkaline soils. It also explains that, at the time the legal ruling was written, the Department of Agriculture already considered carbon dioxide sold for such a purpose to be an "agricultural mineral," which is included in the definition of fertilizer for sales and use tax purposes. (Annotations, which are published in the Business Taxes Law Guide, are summaries of conclusions reached in selected legal rulings. See, Reg. 5700, *Annotations*.)

More recently, a question has arisen as to whether carbon dioxide should be classified as fertilizer, when used by a hydroponic farmer. (Hydroponics is a subset of hydroculture and is a method of growing plants using mineral nutrient solutions, in water, without soil.) In the particular case in question, the carbon dioxide is converted to a gaseous form that is delivered to the plants through a perforated tube at or near ground level. The carbon dioxide percolates up and is absorbed by the leaves of the plant (through foliar application) in order to support the life of the plant. Board staff questioned whether carbon dioxide used in hydroponic farming should still be classified as an agricultural mineral,

which is included in the definition of fertilizer in Regulation 1588, or whether such use makes the carbon dioxide an auxiliary soil and plant substance, which is specifically not a fertilizer under Regulation 1588. Board staff concluded that carbon dioxide used in hydroponic farming is a fertilizer because the Board had previously concluded that carbon dioxide is a fertilizer when used for the purpose of furnishing an element to be absorbed by the plant itself, thereby becoming a part of the plant's growth, and Regulation 1588 provides for fertilizer to be applied through foliar application. Board staff also concluded that it would be helpful to amend Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and specify that carbon dioxide is not an auxiliary soil and plant substance for sales and use tax purposes.

#### *Interested Parties Process*

Business Taxes Committee staff drafted amendments to Regulation 1588, subdivision (b) to clarify the treatment of carbon dioxide and fertilizer used in hydroponic farming. The draft amendments suggested adding language to subdivision (b)(1) of Regulation 1588 to specifically include carbon dioxide in the definition of fertilizer and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The draft amendments suggested revising Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The draft amendments to Regulation 1588, subdivision (b)(1) also add the word "packaged" before the references to "soil amendments" to be consistent with Food & Ag. Code section 14552.

Business Taxes Committee staff subsequently provided its draft amendments to Regulation 1588 to the interested parties and conducted an interested party meeting on May 21, 2014, to discuss the draft amendments. No formal comments were submitted, however, staff worked with interested parties' suggestions to refine the draft amendments. No further comments or concerns were expressed by interested parties.

#### *September 23, 2014, Business Taxes Committee Meeting*

Subsequently, staff prepared Formal Issue Paper 14-005 and distributed it to the Board Members for consideration at the Board's September 23, 2014, Business Taxes Committee meeting. Formal Issue Paper 14-005 recommended that the Board propose to add language to Regulation 1588, subdivision (b)(1) to specify that the term fertilizer includes carbon dioxide and provide that carbon dioxide is not an auxiliary soil and plant substance as that term is defined in Food & Ag. Code section 14513. The formal issue paper also recommended that the Board propose to revise

Regulation 1588, subdivision (b) to clarify and further emphasize that the exemption may apply to sales of fertilizer applied to land or in foliar application. The issue paper also recommended that the Board propose to update the references to “soil amendments” in Regulation 1588, subdivision (b)(1) so that they refer to “packaged” soil amendments to be consistent with Food & Ag. Code section 14552.

Mr. John Gamper, from the California Farm Bureau Federation, appeared during the September 23, 2014, Business Taxes Committee meeting and expressed support for the proposed amendments. Ms. Jeanette Lombardo, from California Food and Agribusiness Advocates, representing Houweling’s Tomatoes, appeared along with Mr. Martin Weijters, Senior Corporate Grower, Houweling’s Tomatoes, and stated that they were available to answer any question the Members may have.

At the conclusion of the Board’s discussion of Formal Issue Paper 14-005 during the September 23, 2014, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1588 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1588 are reasonably necessary to have the effect and accomplish the objective of addressing the issue regarding carbon dioxide used in hydroponic farming (discussed above).

The Board anticipates that the proposed amendments to Regulation 1588 will promote fairness and benefit taxpayers, Board staff, and the Board by clarifying that RTC section 1588 applies to carbon dioxide and fertilizer used in hydroponic farming.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1588 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations because Regulation 1588 is the only state regulation implementing, interpreting, and making specific the exemption provided by RTC section 6358, subdivision (d). In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1588 or the proposed amendments to Regulation 1588.